



DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 107 and 190

[Docket No. PHMSA-2021-0119]

RIN 2137-AF58

Administrative Rulemaking – Criminal Referrals

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: PHMSA is incorporating within its regulations language noting its employees' ability to refer actual or possible criminal activity in connection with PHMSA's jurisdictional statutes directly to the DOT Office of Inspector General (OIG).

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jeremy Henowitz, Attorney-Advisor, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC, 20590, Jeremy.Henowitz@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Background

PHMSA regulations governing its hazardous materials safety and pipeline safety programs provide for referral of actual or possible criminal violations of the Hazardous Materials Transportation Act (49 U.S.C. 5101 et seq.), Pipeline Safety Act (49 U.S.C. 60101 et seq.), and orders or regulations issued thereunder, to law enforcement personnel. Specifically, 49 CFR 107.335 and 190.293 contemplate that employees will report such activity through internal channels, with the PHMSA Office of Chief Counsel thereafter directing allegations to the

Department of Justice (DOJ). PHMSA regulations are silent regarding whether employees may bring criminal referrals directly to OIG.

OIG concluded in an August 22, 2018, audit report¹ that DOT and its Operating Administrations' policies governing employee referrals of actual or possible criminal activity to OIG were dated, and that some Operating Administration policies may in fact hinder such referrals to OIG. OIG recommended updating pertinent DOT Orders regarding an employee's ability to refer criminal activity to OIG, followed by each Operating Administration aligning their procedures with those updated DOT Orders.

DOT issued Order 8000.8A² to implement OIG's recommendation. DOT Order 8000.8A built on language within predecessor DOT Order 8000.8 and DOT Order 8000.5A regarding employees reporting criminal activity through internal channels, by stating explicitly that DOT "[e]mployees also have the option of making a direct referral to the Inspector General." PHMSA has also updated pertinent agency procedures³ to align with those revisions introduced in DOT Order 8000.8A.

In parallel with updating pertinent procedures, PHMSA is updating provisions in its regulations governing criminal referrals through this rulemaking. The revised language in §§ 107.335 and 190.293 clarifies that PHMSA employees may directly refer actual or possible criminal activity to OIG through its hotline accessible by telephone, email, physical mail, or OIG's website (<https://www.oig.dot.gov/fraud-hotline>). PHMSA expects that these amendments to its regulations will increase transparency, accountability, reduce waste, fraud, and abuse, and are in line with PHMSA's mission to assure safe transportation of energy and hazardous materials.

¹ DOT OIG, No. ST2018076, "DOT Operating Administrations Can Better Enable Referral of Potentially Criminal Activity to OIG" (Aug. 22, 2018) (OIG Report).

² DOT, Order No. 8000.8A, "Office of Inspector General Investigative Responsibilities," at 6(c) (Nov. 20, 2020).

³ Specifically, PHMSA Office of Hazardous Materials Safety, "Inspection, Investigation and Enforcement Manual Version 2.1," *available at* <https://www.phmsa.dot.gov/field-operations/operational-guidance/inspection-investigation-and-enforcement-manual-version-21> (update forthcoming) *and* PHMSA Office of Pipeline Safety, "Pipeline Safety Enforcement Procedures," *available at* <https://www.phmsa.dot.gov/pipeline/enforcement/pipeline-enforcement-procedures> (last accessed Apr. 11, 2022).

II. Issuance of a Final Rule

DOT is publishing this final rule without notice and comment and with an immediate effective date. The Administrative Procedure Act (APA) (5 U.S.C. 551, et seq.) does not require notice and comment procedures for rulemakings establishing rules governing “matter[s] relating to agency management or personnel.” 5 U.S.C. 553(a)(2). Here, the language being added to the regulations concerns internal PHMSA procedures regarding employees’ direct referral of actual or possible criminal activity to OIG.

III. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and is considered not significant under Executive Order 12866 (“Regulatory Planning and Review”)⁴ and DOT Order 2100.6A (“Rulemaking and Guidance Procedures”); therefore, the final rule has not been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

B. Regulatory Flexibility Analysis

PHMSA has determined the Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601, et seq.) does not apply to this rulemaking. The RFA applies, in pertinent part, only when “an agency is required . . . to publish general notice of proposed rulemaking.” 5 U.S.C. 604(a).⁵ The Small Business Administration’s “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act” (2017), explains that:

⁴ 58 FR 51735 (Oct. 4, 1993).

⁵ Under 5 U.S.C. 603(a), the RFA also applies when an agency “publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States.” However, this rule does not involve the internal revenue laws of the United States.

If, under the APA ... the agency is required to publish a general notice of proposed rulemaking (NPRM), the RFA must be considered [citing 5 U.S.C. 604(a)].... If an NPRM is not required, the RFA does not apply.

As stated above, the APA allows PHMSA to publish this final rule without notice and comment. Therefore, the analytical requirements of the RFA do not apply.

C. Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”).⁶ This regulation has no substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government. It does not contain any provision that imposes substantial direct compliance costs on State and local governments, nor any new provision that preempts State law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”)⁷ and DOT Order 5301.1 (“Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes”). Because none of the measures in the rule have Tribal implications or impose substantial direct compliance costs on Indian Tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the Federal Register providing notice of and a 60-day comment period on, and otherwise consult with members of the public

⁶ 64 FR 43255 (Aug. 10, 1999).

⁷ 65 FR 67249 (Nov. 6, 2000).

and affected agencies concerning, each proposed collection of information. 5 CFR 1320.8(d). This final rule imposes no new information reporting or record keeping necessitating clearance by OMB.

F. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) requires Federal agencies to prepare a detailed statement on major Federal actions significantly affecting the quality of the human environment. The Council on Environmental Quality implementing regulations (40 CFR parts 1500–1508) require Federal agencies to conduct an environmental assessment considering (1) the need for the action, (2) alternatives to the action, (3) probable environmental impacts of the action and alternatives, and (4) the agencies and persons consulted during the consideration process. *See also* DOT Order 5610.1C (“Procedures for Considering Environmental Impacts”).⁸

1. Need for the Action

This final rule responds to a recommendation made by OIG for Operating Administrations to clarify that employees can report actual or possible criminal activity directly to OIG. This likewise updates PHMSA’s regulations to be harmonious with DOT Order 8000.8A.

2. Alternatives Considered

In developing this rule, PHMSA considered two alternatives:

Alternative (1) No Action: One alternative is to take no action. Under the current regulatory regime, PHMSA employees may report actual or possible criminal activity through internal channels, with the PHMSA Office of Chief Counsel thereafter directing allegations to the DOJ; it is not clearly stated whether they may make reports directly to OIG. OIG found that approach, and similar ambiguities within the regulatory regimes of other DOT Operating

⁸ 44 FR 56420 (Oct. 1, 1979).

Administrations, were confusing and minimized employees' use of the referral process. We reject the no action alternative.

Alternative (2) Preferred Action: The preferred alternative is to amend the regulatory language. This alternative incorporates recommendations from OIG and action required in DOT Order 8000.8A to clarify that PHMSA employees may make direct referrals to OIG of actual or potential criminal activity.

3. Environmental Impacts

This rule affects only internal PHMSA administrative procedures and personnel. Any environmental impact from clarifying the ability of PHMSA employees to refer conduct to OIG would be de minimis. It will have no direct effect but may result in more timely referral to OIG of wrongdoing that could be harmful to the environment, thereby ceasing that harmful behavior. On the other hand, the status quo risks delayed reporting, and therefore remediation, of criminal activities deleterious to the environment.

4. Agencies Consulted

PHMSA consulted with the Office of the Secretary of Transportation.

5. Finding of No Significant Impact

PHMSA has reviewed this action and determined it will not significantly impact the quality of the human environment. The amendments only affect administrative procedures by clarifying the ability of PHMSA personnel to make direct referrals to OIG. This amendment has no predictable adverse impact on human health or the environment.

G. Unfunded Mandates Reform Act

PHMSA analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.). PHMSA considered whether the rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year. PHMSA has determined that this final rule will not result in such expenditures.

Accordingly, no further assessment or analysis is required under the Unfunded Mandates Reform Act.

List of Subjects

49 CFR Part 107

Administrative practices and procedure, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 190

Administrative practice and procedure, Penalties, Pipeline safety.

Accordingly, PHMSA amends 49 CFR parts 107 and 190 as follows:

Title 49 – Transportation

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 Section 4; Pub. L. 104–121 Sections 212–213; Pub. L. 104–134 Section 31001; Pub. L. 114–74 Section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97; 33 U.S.C. 1321.

2. Revise § 107.335 to read as follows:

§ 107.335 Criminal referrals.

(a) If a PHMSA employee becomes aware of any actual or possible activity subject to criminal penalties under § 107.333, the employee must report it to the Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, and to the employee’s supervisor. The Chief Counsel may refer the report to the Associate Administrator to investigate. If appropriate, the Chief Counsel shall refer the report to the Office of Inspector General, or other law enforcement as appropriate (with notification to the Office of Inspector General as soon as possible).

(b) A PHMSA employee also has the option of making a direct referral to the Office of Inspector General (OIG), either by directly contacting an OIG investigator, or via the OIG hotline at (800) 424-9071, at <https://www.oig.dot.gov/hotline>, by email at hotline@oig.dot.gov, or by mail to the Office of Inspector General, 1200 New Jersey Ave SE, West Bldg 7th Floor, Washington, DC 20590.

PART 190—PIPELINE SAFETY ENFORCEMENT AND REGULATORY PROCEDURES

3. The authority citation for part 190 continues to read as follows:

Authority: 33 U.S.C. 1321(b); 49 U.S.C. 60101 *et seq.*

4. Revise § 190.293 to read as follows:

§ 190.293 Criminal referrals.

(a) If a PHMSA employee becomes aware of any actual or possible activity subject to criminal penalties under § 190.291, the employee must report it to the Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, and to the employee's supervisor. The Chief Counsel may refer the report to the Associate Administrator to investigate. If appropriate, the Chief Counsel shall refer the report to the Office of Inspector General, or other law enforcement as appropriate (with notification to the Office of Inspector General as soon as possible).

(b) A PHMSA employee also has the option of making a direct referral to the Office of Inspector General (OIG), either by directly contacting an OIG investigator, or via the OIG hotline at 800-424-9071, at <https://www.oig.dot.gov/hotline>, by email at hotline@oig.dot.gov, or by mail to the Office of Inspector General, 1200 New Jersey Ave SE, West Bldg 7th Floor, Washington, DC 20590.

Tristan H. Brown,

Deputy Administrator.

[FR Doc. 2022-09740 Filed: 5/10/2022 8:45 am; Publication Date: 5/11/2022]